IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

JESS RAYMOND BRIDWELL, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, JESS RAYMOND BRIDWELL, hereby petitions that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the conviction of Petitioner for interstate travel in aid of a racketeering enterprise in violation

of 18 U.S.C. §1952.

OPINION BELOW

The opinion below has not yet been reported. An advance copy of the Opinion is appended hereto in the Appendix.

JURISDICTION

The Opinion rendered by the Tenth Circuit Court of Appeals which the Petitioner seeks to have reviewed was filed on June 4, 1971. An order denying a Petition for Rehearing was entered on July 1, 1971. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question in 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can a conviction under 18 U.S.C. §1952 be based on a single trip across a state line, followed by a dice game?

2. Must the unlawful activity (illegal business enterprise) necessary to sustain conviction under 18 U.S.C. §1952 occur in the state alleged in the indictment?

3. If the unlawful activity (illegal business enterprise) necessary for conviction

under 18 U.S.C. §1952 can be shown to have occurred in states other than alleged in the indictment, must the evidence show that the unlawful activity relied upon was illegal under the laws of the state in which they occurred?

4. Can the government introduce into evidence tax returns of a Defendant in a criminal trial without complying with 26 C.F.R. §301.6103 (a-1)h?

5. This Petitioner incorporates questions presented by Co-Petitioner, MICHAEL E. PAULDINO, whose Petition is due August 30, 1971. .

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Title 18 U S.C. §1952, the essential parts of which are as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --
>
> . . . .
>
> . . . .
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . .

(b) As used in this action "unlawful activity" means (1) any business enterprise involving gambling, liquor on which federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States . . . :

2. 26 C.F.R. §301.6103(a)-1(h), which provides in part:

Use of Returns. Returns made in respect of any tax described in paragraph (a)(2) of this Section, or copies thereof, may be furnished by the Secretary or the Commissioner or the Delegate of either to a United States Attorney or an Attorney of the Department of Justice for official use in proceedings before a United States Grand Jury or in litigation in any court, if the United States is interested in a result, or for the use in preparation for such proceedings or litigation. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Returns or copies thereof will be furnished without written application therefor to the United States Attorneys and Attorneys of the Department of Justice for official use in the prosecution of claims and demands by, and offenses against, the United States, or the defense of claims and demands against the United States or officers or employees thereof, in cases arising under the Internal Revenue Laws or related statutes which were referred by the Department of the Treasury to the

> Department of Justice for such prosecution or defense. In all other cases, written application for a Return or copies thereof shall be made through the Commissioner of Internal Revenue, Washington 25, D.C., or where it is desired that a return or copies thereof be furnished by the Internal Revenue Officer (District Director or Director of Internal Operations) with whom the Return was filed, the applications shall be made to such officer. The application shall be signed by the United States Attorney if the Return or copy is for his use, or by the Attorney General, the Deputy Attorney General, or an assistant Attorney General if the Return or copy is for the use of an Attorney of the Department of Justice . . . .

STATEMENT OF THE CASE

On April 4, 1969, the Petitioner was indicted for acts alleged to have occurred in Nebraska on or about November 1, 1966, in violation of 18 U.S.C. §1952. A Bill of Particulars filed by the government stated that both Defendants traveled from Denver, Colorado, to Omaha and Albion, Nebraska, on or about November 1, 1966, to promote, manage, establish and carry on unlawful activity, namely, a business enterprise involving gambling in violation of certain Nebraska gambling statutes.

The Petitioner, Co-Defendant and certain other individuals traveled to Albion, Nebraska, and looked at some livestock at a sales barn. Thereafter they rolled the sales barn owner's dice with him to see who would pay for some

liquor. A crap game ensued which involved the Petitioner, Co-Defendant and some of the local residents. The evidence showed that Petitioner traveled from Denver to Albion prior to the dice game. This was the only gambling activity shown to have taken place in Nebraska. An FBI agent testified that Petitioner's Co-Defendant admitted to a Colorado jury in 1966 that he was a professional gambler. Another FBI agent testified that in Colorado in 1953 Petitioner admitted to being a gambler. The Income Tax Returns of Petitioner and his Co-Defendant were introduced which showed that their occupations were gambling. A gambling casino owner from Elko, Nevada, testified that Petitioner and his Co-Defendant had gambled in his casino in September of 1966. Thereafter, testimony was introduced from a passenger on an airliner, a construction company owner from Canada and a Royal Canadian Mounted Police Officer. This testimony was to the effect that Petitioner had engaged in card games on an airliner and in Canada and had won money by cheating. There was also testimony that Petitioner possessed marked cards and loaded dice when he was in Canada.

It was upon this state of the evidence, that the Petitioner was convicted. The Tenth Circuit affirmed that conviction, holding that the unlawful activity, namely, an illegal business enterprise involving gambling, need not have occurred in Nebraska as alleged in the indictment. The Court stated that it could find no case directly on point. (Opinion Page 5)

The Tenth Circuit also held that no prejudicial error occurred from the government's

use of tax returns. The Court stated "the probative value of the returns as evidence in a Court Room is neither enhanced nor diminished by compliance with the regulation." . . . (Opinion Page 8)

REASONS FOR GRANTING THE WRIT

POINT I.

A CONVICTION UNDER TITLE 18 U.S.C. §1952 CANNOT BE BASED ON A SINGLE TRIP ACROSS A STATE LINE, AND A SHOWING THAT A DEFENDANT PARTICIPATED IN A SINGLE DICE GAME.

POINT II.

THE UNLAWFUL ACTIVITY (ILLEGAL BUSINESS ENTERPRISE) NECESSARY TO SUSTAIN CONVICTION UNDER 18 U.S.C. §1952 MUST OCCUR IN THE STATE ALLEGED IN THE INDICTMENT.

POINT III.

IF THE UNLAWFUL ACTIVITY (ILLEGAL BUSINESS ENTERPRISE) NECESSARY FOR CONVICTION UNDER 18 U.S.C. §1952 CAN BE SHOWN TO HAVE OCCURRED IN STATES OTHER THAN ALLEGED IN THE INDICTMENT, THE EVIDENCE MUST SHOW THAT THE UNLAWFUL ACTIVITY RELIED UPON WAS ILLEGAL UNDER THE LAWS OF THE STATE IN WHICH THEY OCCURRED.

The Court of Appeals for the Tenth Circuit in the case presently under consideration held that the Petitioner violated 18 U.S.C. §1952 by traveling to Nebraska on one occasion and engaging in a dice game while there. The Court relied on the evidence the government offered that the Petitioner was a professional gambler, in effect holding that a gambler who crosses a state line and engages in a single act of gambling in that state violates 18 U.S.C. §1952. This seems to be in conflict with the decision of the Fifth Circuit Court of Appeals in the case of Rewis v. United States, 418 F.2d. 1218 (5 Cir. 1969), Rev'd on other grounds. 400 U.S. 818, 91 S. Ct. 1056 (1971), and U.S. v. Hawthorne, 356 F.2d 740 (4th Cir. 1966) Cert. denied, 384 U.S. 908. In the Rewis Case, the Fifth Circuit held that interstate gamblers crossing state lines to place bets in a gambling establishment, which was operated in violation of the laws in the state where it was located, did not violate Section 1952. The Court said:

> ". . . We do not believe that the patronizing by interstate gamblers of a gambling establishment fits within the terminology of 'promote, manage, establish, carry on, or facilitate the promotion, management, establishment, carrying on of any unlawful activity.'
>
> "We conclude that the convictions against Fuller and Nightengale cannot stand because there was insufficient evidence to show that they were other than participants in placing bets at the Williams establishment, and, as such, they could not have been found by the jury to have been guilty of any overt act

prohibited by the Federal Statute." 418 F.2d. 1218, 1221 (5th Cir. 1969)

The Supreme Court of the United States commented upon that portion of the Fifth Circuit Decision reversing the conviction of the patron of a gambling establishment saying:

> "We agree with the Court of Appeals that it cannot be said with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act. But we are also unable to conclude that conducting a gambling operation frequented by out-of-state betters, by itself, violates the Act. Section 1952, prohibits interstate travel with intent to 'promote, manage, establish, carry on or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. Legislative history of the act is limited, but does reveal that Section 1952 was aimed primarily at organized crime, and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another . . . . "

Rewis v. U.S., 400 U.S. 818, 91 S.Ct. 1056 (1971) (Footnotes omitted). Reversed on other grounds.

In Hawthorne supra, it was found not to be the intent of the statute to make it a crime per se

for a person who operates a gambling establishment to travel interstate.

Considering the above cases it appears that there is a conflict of authority between Circuits on what must be shown to constitute a violation of 18 U.S.C. §1952.

Other Federal Courts have held that the business enterprise must be of a continuing nature. The Second Circuit Court of Appeals in United States v. Brennan, 394 F.2d. 151 (2nd Cir. 1968), Cert. denied, 393 U.S. 839, held that a dice game operated on a boat traveling from New York to New Jersey constituted a business enterprise, as it was held four or five times a week with a large number of participants each time. The Court felt that the regularity of the game, its location, size, and operation all were of such a continuing nature that a business enterprise was involved. In the case of United States v. Teemer, 214 F. Sup. 952 (D.C.W.V.A. 1963), the Federal District Court held that Section 1952 was intended to attack entrenched operations rather than sporadic games of chance. Apparently the Tenth Circuit is then in conflict with the Second Circuit Court of Appeals, since in Petitioner's case a single dice game was sufficient basis for Petitioner's conviction. Further, the Eighth Circuit Court of Appeals has apparently held that a continuing course of activity in the state where the alleged violation occurred is required. In Spinelli v. U.S., 382 F.2d. 871 (8 Cir., 1967), Reversed on other grounds, 393 U.S. 410 (1969), the Eighth Circuit said:

> "The evidence indicates that Spinelli was not a casual offender engaging in a

> Friday Night game of cards with some friends in Missouri. He was a racketeer committing regular and significant violations of the Missouri Law. He made regular and repeated trips across the state line, over a long period of time was involved in a very substantial gambling business. The prosecuting officials did not abuse the powers of bringing charges against Spinelli and the Trial Court properly sustained the validity of the charge." 382 F.2d 871, 890 (8 Cir. 1967)

Additionally, it is important that Certiorari be granted in this case to review the holding that evidence of gambling activities, other than those alleged in the indictment to have occurred in Nebraska, were admissible. The Ninth Circuit Court of Appeals in Turf Center, Inc. v. United States, 325 F.2d. 793 (9 Cir. 1963), held that an allegation concerning gambling in a charge under 18 U.S.C. §1952 has to be looked at in the light of the terms of the statute, and that the statute requires that such gambling has to be in violation of the state in which the gambling occurred. In Petitioner's case the evidence that was offered by the prosecution concerning other gambling activities of Petitioner were not shown to be in violation of the laws of the states in which they occurred, and therefore under the terms of the statute this should not have been considered. The legislative history seems to conflict with the decision of the Tenth Circuit in Petitioner's case. The "Sectional analysis" as provided by the Judiciary Committee of the United States in reporting out the legislative bill which became Section 1952 stated:

> "The use of the term 'business enterprise' requires that the activity be a continuous course of conduct. Thus, individual or isolated violations would not come within the scope of this bill since they do not constitute a continuous course of conduct so as to be a business enterprise." U.S. Code Congressional Administrative News (1961) P. 2666.

As stated in Spinelli supra, Congress defined "illegal activity" to mean, among other things, "any business enterprise involving gambling . . . in violation of the laws of the state in which [it was] committed." (P. 879)

The Court's admission of testimony that Petitioner was a prolific gambler and a cheater was contrary to protection afforded defendants in many other circuits and in this Court. Brinegar v. U.S., 338 U.S. 160 (1949); Barnes v. U.S., 365 F.2d 509 (D.C. Cir. 1966); Hurst v. U.S., 337 F.2d 678 (5th Cir. 1964); Boyd v. U.S., 142 U.S. 450 (1892); Lovely v. U.S., 169 F.2d 386 (4th Cir. 1948); and Hartman v. U.S., 215 F.2d 386 (8th Cir. 1954).

The Petitioner respectfully submits that because of the apparent conflict between Circuits in interpreting Section 1952 and because of the substantial question that exists as to the meaning of the statute this Honorable Court should grant this petition for Writ of Certiorari so that a final determination of these important questions can be had.

POINT IV.

THE GOVERNMENT SHOULD NOT BE ALLOWED TO INTRODUCE TAX RETURNS OF A DEFENDANT INTO EVIDENCE WHEN THERE HAS NOT BEEN A SHOWING THAT THE GOVERNMENT HAS COMPLIED WITH ITS OWN REGULATIONS CONCERNING HOW COPIES OF TAX RETURNS ARE TO BE OBTAINED.

The Tenth Circuit in its Opinion held that it was not error to allow Petitioner's Income Tax Return into evidence even though the government had not shown that it had complied with its regulation concerning how the Income Tax Return was to be obtained. The Court stated on Page 8 of its Opinion as follows:

> ". . . The probative value of the returns as evidence in a Court Room is neither enhanced nor diminished by compliance with the regulation. . . ."

This holding of the Tenth Circuit seems to conflict with the rule that has been applied in constitutional cases requiring that prosecuting officials comply with the law in their endeavors to force it. See Elkins v. U.S., 364 U.S. 206, 80 S. Ct. 1437 (1960), the question here presented is whether the government can use evidence when it did not show that it has complied with its own regulations concerning how that evidence can be obtained. The Tenth Circuit does not really answer this question by saying that compliance with the regulation would not enhance or detract from the probative value of the evidence. This misses the point which is

important. Every defendant in a criminal case should be assured that the prosecuting officials obey the law, and every defendant in a criminal case has the right to be tried with evidence that is obtained by legal methods. This Court should consider this question because it is important to establish whether the government can violate or disregard its own regulations in carrying out criminal prosecutions.

POINT V.

THIS PETITIONER INCORPORATES QUESTIONS PRESENTED BY CO-PETITIONER, MICHAEL E. PAULDINO, WHOSE PETITION IS DUE AUGUST 30, 1971.

The Petitioner and Co-Petitioner, Michael E. Pauldino, were Co-Defendants in the trial court and were consolidated in the Tenth Circuit Court of Appeals for oral argument. Co-Petitioner has now obtained independent counsel who would have filed a single Petition for Writ of Certiorari with Petitioner but for Co-Petitioner's extension of time to August 30, 1971. Since counsel had agreed to divide the points to be covered, this Petitioner hereby requests that the Court consider the Petition for Writ of Certiorari of Michael E. Pauldino contemporaneously with the consideration of this Petition.

CONCLUSION

For these reasons, a Writ of Certiorari

should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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